Supreme Court, U.S.
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No. 01-417

IN THE

Supreme Court of the United States

ROBERT J. DEVLIN,

Petitioner,

v.

ROBERT A. SCARDELLETTI, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR CITIBANK (SOUTH DAKOTA), N.A., AS AMICUS CURIAE SUPPORTING RESPONDENTS

SETH P. WAXMAN
Counsel of Record
EDWARD C. DUMONT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

CHRISTOPHER R. LIPSETT
MATTHEW P. PREVIN
ARLO DEVLIN-BROWN
WILMER, CUTLER & PICKERING
520 Madison Avenue
New York, N.Y. 10022
(212) 230-8800

Counsel for Amicus Curiae Citibank (South Dakota), N.A.

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INTEREST OF AMICUS[1]

Amicus Citibank (South Dakota), N.A., is a major issuer of credit cards. As such, it has considerable experience as a defendant in class-action litigation. In particular, Citibank is presently defending, in three related appeals that are pending before the Ninth Circuit, the settlement approved by the district court in a nationwide class action challenging certain payment-crediting practices. Those appeals include ques-

[1] Counsel for Citibank authored this brief in its entirety. No person other than Citibank or its counsel made a monetary contribution to the preparation or submission of this brief. The parties' written consent to the filing of this brief has been filed with the Clerk.

tions concerning what type of participation in the district court is necessary to support an objector's standing to appeal. Indeed, an appellant in that case has filed an *amicus* brief supporting petitioner in this case. Citibank accordingly has a significant interest in the proper resolution of this case.

SUMMARY OF ARGUMENT

Class actions often end in settlement. Such a settlement is negotiated by the named parties who have been certified by the district court to represent the class. Members of the class who object to the settlement are entitled to notice and to an opportunity to present their objections to the district court, and the settlement cannot become effective until the court approves it as fair and adequate. Objectors who are not named parties to the suit should not be entitled to appeal that determination, advancing a position contrary to that of the certified class representatives, unless they have separately intervened in the action.

We focus on two considerations: The representative nature of class actions, and the special context of settlement. Rule 23 makes clear that class litigation is to be conducted by named parties as representatives of the class, subject to a variety of express safeguards designed to protect the class. In the case of settlement, those safeguards include notice, an opportunity to raise objections in the district court, and an independent evaluation of the settlement by the district court. The rule also expressly contemplates intervention by class members who seek a more active role in the litigation. Nothing in the rule suggests that once the class's certified representatives have reached a settlement, and the district court has approved it, individual class members who have not sought to intervene under Rule 24 should nonetheless be allowed to appeal in order to challenge the agreement and positions adopted by their class representatives.

Petitioner suggests that class members who have not intervened should nonetheless be permitted to appeal either to

pursue their individual interests, or to challenge a settlement as inadequate from the point of view of the class. Both individual and class interests are fully protected, however, by the protections built in to Rule 23 — including the opportunity to seek intervention under the standards set out in Rule 24. Those standards focus on the existence of a legitimate interest on the part of the intervenor, and whether intervention is appropriate in order to protect that interest. A ruling on a motion to intervene therefore ensures that the district court will have an opportunity to address the issues most relevant to whether a particular class member should be allowed to appeal, and allows for the building of an adequate record to permit review of that determination, if necessary, by the court of appeals.

Petitioner's arguments concerning the burdens imposed by an intervention requirement are unpersuasive. Moreover, the costs of allowing unfettered objector appeals, without any district-court gatekeeping, are substantial. In any event, the policy arguments for and against allowing such appeals are best directed to those responsible for framing amendments to the federal rules — who are, in fact, actively considering draft amendments to Rule 23. In the absence of such an amendment, the better course for this Court is to adhere to the text and structure of the existing rules, including the traditional mechanism of intervention.

ARGUMENT

I. NOTHING IN RULE 23 SUGGESTS THAT APPEALS BY CLASS MEMBERS WHO OBJECT TO A SETTLEMENT SHOULD BE AN EXCEPTION TO THE REPRESENTATIVE NATURE OF CLASS ACTIONS

It is "well settled" that, as a rule, "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); *see also, e.g., Karcher v. May*, 484 U.S.

72, 77 (1987); Fed. R. App. P. 3(c) (cited in *Marino*). Of course, "[o]ne who is not an original party to a lawsuit may . . . become a party by intervention, substitution, or third-party practice." *Karcher*, 484 U.S. at 77. The district court in this case denied petitioner's motion to intervene as untimely. *See* Pet. App. A9. The question before the Court is whether petitioner nonetheless had a right to appeal from the district court's judgment approving, over petitioner's objection, the settlement of a class action in which petitioner was an unnamed member of the class.[2]

The proper answer to that question is no, because successful intervention should be a predicate for appeal on the merits of the settlement. Petitioner argues principally (Br. 16-28) that he is a "party" to this case, for purposes of appeal, because his legal rights with respect to the subject matter of the action are likely to be finally determined by the judgment. He also relies (*e.g.*, Br. 20-23) on a variety of cases in which particular litigants have been permitted to appeal particular orders. We agree with respondents that the claim-preclusive effect of a class-action judgment does not, by itself, make petitioner a "party" to the proceeding.[3] We also agree that the "quasi-party" and "nonparty" cases that petitioner cites (*id.*) are readily distinguishable from this one.[4] Rather than revisiting all of the arguments joined in the

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[2] There is no dispute that petitioner had a right to appeal the denial of his motion to intervene. The court of appeals unanimously sustained the district court's decision in that regard. Pet. App. A10-A14, A30.

[3] Among other things, the logic of petitioner's argument would lead to the conclusion that an unnamed class member has the right to participate as a party, without intervening, in every aspect of the litigation, and the right to appeal from a judgment that resulted from fully contested litigation, rather than from a settlement. Those are not tenable conclusions.

[4] Petitioner relies (Br. 21-22), for example, on *Williams v. Morgan*, 111 U.S. 684 (1884). The premise of that reliance is that the parties allowed to appeal, who objected to the amount of compensation awarded trustees in the proceeding in the trial court, "had not formally intervened." Although the terminology of 1884 may not correspond seamlessly with that of the modern federal rules, as a substantive matter that premise is clearly wrong. *See id.* at 691-94 (objectors' participation in the trial court was hotly contested; the objectors "filed applications to the court for leave to be heard," and "[t]he court granted both of these applications"); *id.* at 696 ("As to the right of [the objectors] to appeal, this depends on their right to intervene and contest the allowances to the trustees; or rather on the power of the [trial] court to allow them to do so."; trial court properly granted their "formal applications" to be heard); *id.* at 698-700 (objectors had right to participate below "under the leave of the court"; "*quasi* parties" are ones "incidentally interested" in litigation, who are "allowed to intervene"; objectors were so situated, on the particular facts, that they had a right to participate below "by leave of the court," and then to appeal from the decree).

The cases petitioner cites pre-date the federal rules and their regularization of the intervention mechanism. The "quasi-party" cases involve allowing a party who is otherwise *unrepresented* in the action, such as a bidder at a foreclosure sale, to join it in order to protect some individual interest. As we discuss below, the class action is a *representative* action, in which the interests of objectors, as members of the class, are already at least putatively represented. If an objector challenges the adequacy of that representation (in the context of settlement or otherwise), the intervention mechanism allows him or her to seek direct participation in the case.

principal briefs, however, we will focus on two considerations that we believe are critical here.

First, the class-action context differs radically from the normal model of individual-party litigation. Class actions are governed by the special standards set out in Rule 23 of the Federal Rules of Civil Procedure. They may proceed as such only if the district court specifically determines, among other things: (i) that "the class is so numerous that joinder of all members [as traditional "parties" to the action, *see* Fed. R. Civ. P. 19-21] is impracticable"; (ii) that "the claims or defenses of the representative parties are typical of [those] . . . of the class"; and (iii) that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In many cases the district court must also expressly conclude "that a class action is superior to other available methods for the fair and efficient adjudication of

the controversy" — after taking into account, among other factors, "the interest of members of the class in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3). In short, unlike ordinary litigation, in which each "party" is the final judge of its own interests, class actions are, by definition, *representative* actions. In every action that proceeds to a class judgment, the district court has affirmatively determined, under standards defined by law, that it is both fair and most efficient for the case to be litigated by the class members who are specifically *named* as parties, "as representative parties on behalf of all." Fed. R. Civ. P. 23(a); *see also* Rule 23(d) (confirming district court's power to enter appropriate procedural orders to ensure fairness and efficiency of class litigation).[5]

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[5] In addition to the threshold requirements for class certification, Rule 23 provides a number of other express safeguards for non-named class members. In an action certified under Rule 23(b)(3), for example, non-named class members must (so far as possible) be provided with individual notice of the action; notice that they have the right to opt out of participation in the class, thus preserving any right they may have to proceed individually; and notice that if they choose to remain part of the class, they may nonetheless "enter an appearance [in the action] through counsel," and thereby receive court papers. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Harv. L. Rev. 356, 392 & n.137 (1967) (suggesting that the right to appear entitles the non-named class member's counsel "to receive the papers in the action to enable him to follow the case with a view to deciding, *e.g.*, whether he should move to intervene. If 'appearance' is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under rule 24, which is not automatic and requires a showing.") In all class actions, the district court is specifically given authority to "requir[e], for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise to come into the action," and to "impos[e] conditions on the representative parties or on intervenors." Fed. R. Civ. P. 23(d)(2)-(3).

Second, the question presented in this case involves class actions that have been concluded in the district court by *settlement.* Rule 23 deals expressly with settlements, requiring that a class action "not be dismissed or compromised without the approval of the [district] court," after notice to all members of the class. Fed. R. Civ. P. 23(e). The notice required by the rule gives class members who are not named parties the opportunity to examine a proposed settlement, and, if they wish, to comment on or object to the proposal while it is under consideration by the district court. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *cf.* Fed. R. Civ. P. 23(d)(2) (discussing district court's power to require that class members be given notice of "the proposed extent of the judgment" and an opportunity to comment on the adequacy of class representation, to intervene, or "otherwise to come into the action"). Even if no objection is made, Rule 23(e) imposes on the district court an obligation to assure itself that any settlement it approves is fair and reasonable. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999) (stating that Rule 23(e) requires "that any settlement is fair in an overriding sense"); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable."). Nothing in Rule 23, however, addresses the question of appeal from a judgment approving a class-action settlement, or suggests that the action ceases to be a representative one for purposes of such an appeal.

By its terms, then, Rule 23 contemplates actions that are fundamentally collective and representative in nature. That principle is balanced, to a defined extent, by express protections for the interests of class members other than the named plaintiffs or defendants. Those protections include, for example, opt-out rights in many cases, or opportunities for unnamed class members to participate in various ways in the

district court proceedings. The rule makes no mention, however, of appeals by unnamed class members — either in general, or in its provision relating specifically to settlements.[6]

It seems apparent that a completely silent class member, who has not participated in any way in the district court litigation, should not, merely by virtue of being in the class, be deemed a separate "party" entitled to pursue a personal, independent appeal to advance positions contrary to those advanced for the class by its certified representatives. Petitioner, though coy in many respects, does not himself make any argument for independent appeal rights on behalf of such silent class members. And such an appeal would be inappropriate even though the class member will generally be bound, as part of the class, by the district court's judgment. Thus, being bound by a judgment, as a member of a class represented by a duly certified representative, is not by itself sufficient to impart "party" status for purposes of an independent, personal appeal.

An unnamed class member might become involved in a proceeding without intervening by, for example, submitting a statement of objection or approbation about a settlement or some other action by the class representative or the court. The rules, however, provide no basis for an unnamed class member who does not intervene to pursue a separate appeal as an independent "party." And if *some* degree of participation short of intervention will suffice to permit an appeal, it is difficult to see where the line should be drawn, or on what principle or authority it would be based.

Accordingly, as a matter of textual analysis, the better view is that an unnamed class member is not a "party" entitled to his own separate appeal from a class-action judgment. *See* Fed. R. App. P. 3(c) (cited in *Marino*, *supra*.) Even,

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6 The rule does expressly address appeals, but only to provide that a court of appeals may allow immediate appeals of orders granting or denying class certification. Fed. R. Civ. P. 23(f). Such appeals would, as a matter of course, be taken or defended by the named parties.

however, if the Court concludes that such an analysis is insufficient, by itself, to decide this case, any functional analysis must also focus both on the special context of representative class actions under Rule 23, and on the special circumstance of appellate attack by class members who are neither admitted below as parties nor certified as class representatives, on a settlement that has been concluded by the representatives and reviewed and approved by the district court.

II. INTERVENTION IN ACCORDANCE WITH RULES 23 AND 24 IS THE APPROPRIATE MECHANISM FOR DETERMINING THE RIGHT TO APPEAL A JUDGMENT ENTERED ON A CLASS ACTION SETTLEMENT

In considering whether the representative nature of class-action litigation should be disregarded for purposes of allowing settlement appeals without intervention, it is worth emphasizing that one would not normally expect appeals on the merits in cases that have been *settled*. One of the signal benefits of settlement — both for the parties who must determine whether to compromise their claims and defenses, and for the judicial system — is the termination of litigation. Once a fairly represented party has agreed to settle a claim or to forgo a defense, both the opposing party and the courts should ordinarily be entitled to assume that the matter has been concluded.

That assumption is particularly important to both plaintiffs and defendants in large or complex class action-suits (such as the present case), in which settlements typically reflect extensive negotiation, based on compromises, with and among the duly constituted representatives of several classes or sub-classes of potential claimants. And it is perfectly reasonable in the context of Rule 23. The rule provides extensive protections for non-named class members, including notice of and the opportunity to object to any proposed settlement, and an independent evaluation of any such objections and the settlement by the district court. The question here,

then, is what, if any, special circumstances might justify allowing an appeal by an unnamed class member, for the purpose of challenging an otherwise final settlement.

A. The Concerns Cited To Justify Appeals by Non-Named Class Members Are Best Addressed by Application of Rule 23

Petitioner suggests two circumstances in which an appeal by an unnamed class member might be justified. First, he argues that a settlement may be inadequate to protect a class member's individual interests, and that the member should have a right to appeal such a settlement because the judgment will bind him. *See, e.g.*, Pet. Br. 29-32. Second, he argues that a settlement negotiated by the named class members and their counsel may be inadequate from the point of view of the whole class (or an important sub-class). *See, e.g.*, Pet. Br. at 32-36.

1. The first concern is simply answered. To begin with, in the many class actions certified under Rule 23(b)(3), each class member must (to the extent practicable) be given not only individual notice of the action, but the right to be excluded from the class, remaining instead the master of his or her own cause. That option fully protects each class member's rights as an individual. A member who chooses not to opt out should not be permitted to challenge a class settlement reached through the collective procedures of Rule 23, on the ground that it takes insufficient account of his or her individual interests, if the applicable standards for intervention under Rule 24 cannot be met.

Some class actions, such as the one at issue here, do not allow class members to opt out. It is important to recall, however, that in order for such an action to proceed, the district court must make the determinations called for by subsections (a) and (b) of Rule 23 — including that the class is too numerous to allow practical joinder of all class members, that the named parties have typical claims or defenses and "will fairly and adequately protect the interests of the class,"

and that the circumstances of the case otherwise make it appropriate to use representative procedures. The Rule gives the district court broad discretion to ensure the fairness of the proceeding, including requiring that some or all class members be given notice of the pendency of the action and of the opportunity to intervene or otherwise appear. *See* Fed. R. Civ. P. 23(d). And if the representative parties propose to settle the case, the rule requires notice to all class members and the consent of the district court, which the court will not give unless it has determined, after hearing any objections, that the settlement is fair. *See* Fed. R. Civ. P. 23(e).

Further, the possibility of intervention provides adequate protection where there is no right to opt out. A proposed appellant who has not even attempted to intervene to protect his personal interest in an appeal has little justification for complaint, as we discuss more fully *infra*.[7] An objector who seeks to intervene but is denied permission to do so is protected both by process in the district court, and by the right to appeal the intervention ruling. The competing demands of orderly representative litigation, on the one hand, and individual class members' personal interests should surely inform the application of Rule 24 in deciding requests to intervene. But the fact that there can be legitimate individual interests does not mean that no standards whatsoever should be applied in determining whether an individual should be allowed to appeal.

Of course, in any collective process that ends in a negotiated compromise, there will likely be some individuals or groups who remain disgruntled. That is particularly true in complex actions that involve different subgroups, with par-

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[7] As the Court is aware, Charles C. Yeomans has filed an *amicus* brief supporting petitioner in the instant case, and refers at p. 2 n.4 of his brief to a case pending before the Ninth Circuit captioned *Schwartz v. Citibank (South Dakota), N.A.*, No. 00-56958 (9th Cir.). In that case the district court approved the settlement of a class action against Citibank (South Dakota), N.A., and Yeomans has filed an appeal to challenge the district court's approval, although he did not even seek to intervene in that court.

ticular interests that overlap and to some degree conflict. It is, however, part of the nature of a representative litigating process that some dissenting voices or alternative proposals may be overridden by those properly selected as representatives to conduct the litigation. Due process and the federal rules require fair and adequate representation, not representation that is to the precise liking of every member of the represented class. Under Rule 23, moreover, a settlement may be implemented only if the district court, having heard any objections, determines that it is proper to proceed despite them. That opportunity for a hearing and decision by the district court is an adequate safeguard for class members who raise individual objections to a proposed settlement. Without some further showing, there is no need to give individual objectors the further right to step outside the representative process and take unilateral appeals if they cannot qualify for intervention under an appropriate application of the Rule 24 standards.

2. The second concern advanced as a justification for appeals by unnamed class members is the possibility that the named class representatives, and their counsel, who negotiate a settlement may fail to act in the best interests of the class. While the adequacy of class representation is obviously a central issue, it too is already addressed by the procedures expressly set out in Rule 23. Any appellate check on the operation of those procedures should flow from, not supplant, their existing structure.

a. As we have discussed, Rule 23 sets out multiple standards designed to ensure that a class action will proceed as such only if collective, representative litigation is appropriate in the particular case. *See* Fed. R. Civ. P. 23(a) (prerequisites for class action, including typicality of named parties' claims and adequacy of representation) and 23(b) (circumstances under which collective model is appropriate). It relies on the district court to make threshold determinations, *see* Rule 23(a)-(b), (c)(1); to oversee the proceedings, including making appropriate orders "for the protection of the members of

the class or otherwise for the fair conduct of the action," *see* Rule 23(d)(2); and to consider and approve or reject any proposed settlement, *see* Rule 23(e). And within that framework, it obviously relies to some extent, as a practical matter (and like any litigation), on the self-interest, good faith, competence, and ethics of the named parties and their counsel.

The rule also expressly contemplates at least three ways in which class members not originally named as representative parties may become more directly involved — if, for example, they are concerned about the adequacy of class representation. First, in an action certified under Rule 23(b)(3), the notice provided to class members must inform them that if they do not opt out of the class, they may, if they wish, "enter an appearance through counsel" and thereby be kept abreast of developments in the case. (*See supra* n.5.) Second, Rule 23(d)(2) provides that the district court may at any time require that class members be given notice of, among other things, "the opportunity . . . to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or otherwise to come into the action." Even if the district does not order such notice in a particular case, the provision for it clearly contemplates both formal intervention and other possible means, regulated by the district court, for non-named parties to appear and participate to varying extents in the case if they have concerns about the adequacy of class representation. *See also* Rule 23(d)(3) (authorizing district court to "impos[e] conditions on the representative parties or on intervenors"). Third, if a settlement is proposed, the Rule provides for notice to the class, and the district court will hear any objections from non-named class members before it enters judgment.

These provisions of Rule 23 suggest a flexible approach to potential participation by non-named class members in the district court. They also suggest a spectrum of possible degrees of involvement, from "enter[ing] an appearance," which might involve little more than receiving copies of litigation papers (*see supra* n.5), to appearing only at a settle-

ment fairness hearing, to "com[ing] into the action" at an earlier point in some manner determined by the district court, to formal intervention as a separate, named party to the case. That spectrum, finally, suggests an appropriate, rule-based rubric for determining whether a class member who is not a named class representative should be permitted to appeal from the judgment entered on a settlement. Given the overall representative framework of Rule 23, and the significant departure from that model entailed by allowing appeals from a settlement, the right to take a separate appeal is best tested by the standards for formal intervention in the action.

b. Those standards are set out in Rule 24. At the core of those standards is the existence of a legitimate interest on the part of the proposed intervenor, and whether intervention is necessary or appropriate in order to protect that interest. For example, in ruling on a motion to intervene as of right, *see* Fed. R. Civ. P. 24(a)(2), the district court is specifically required to consider whether "the applicant's interest is adequately represented" already.

In the class-action context, the same consideration should also be central to any discretionary decision under Rule 24(b)(2). *See, e.g.*, *In re Thompson*, 965 F.2d 1136, 1142 n.10 (1st Cir. 1992) (affirming denial of permissive intervention where proposed intervenor's interests were "adequately represented by an existing party"); *People v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (same); *United States Postal Serv. v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978) (same). Under either standard, this factor has particular relevance to the question presented here, because a principal justification offered for appeals by unnamed class members who object to settlement is the possibility that the named class representatives will have compromised the class's claims in a way that is inadequate or unfair to all or part of the class. If an unnamed class member wishes to make such a showing on appeal, he or she should certainly be prepared to make it in the district court in the first instance.

c. For these reasons, consideration of a motion to intervene is not only a procedurally familiar way of approaching this aspect of class-action management, but also a highly appropriate rubric for deciding whether a particular unnamed class member should be permitted to enter the litigation in a capacity that will entail either the right to agree to any settlement, or the right to appeal if a settlement is approved over her objection. If such a motion is granted, it should follow that the intervenor has the same procedural rights as any other named party — subject to any limitations that may be imposed by the district court. *See, e.g.*, Fed. R. Civ. P. 23(d)(3). If it is denied, that denial is itself appealable. *See, e.g.*, *Marino*, 484 U.S. at 304.

As a matter of orderly judicial administration, there are two important consequences of adopting the intervention standard as the basis for a right to appeal from a class-action settlement. First, it ensures that the district court will have a chance to address, in the first instance, the most relevant issues bearing on whether such an appeal should be allowed. And the district court, far more than an appellate court, will be well situated to create a factual record if necessary concerning the adequacy of ongoing representation absent intervention, and the need and justification for intervention by others in order to protect legitimate class and individual interests. If the would-be appellant has no obligation to intervene at the district court level, such a record may never be created. Second, if the district court denies a motion to intervene and the disappointed objector appeals, the court of appeals will have the benefit of the district court's views on those critical questions, and can efficiently determine, at the threshold, whether the decision on *intervention* — rather than the decision to approve the settlement – was proper. [8] Both

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[8] Appellate courts review the denial of a motion for permissive intervention under Rule 24(b) for abuse of discretion. *See, e.g.*, *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000); *Donnelly v. Glickman*, 159 F.3d 405, 411-12 (9th Cir. 1998); *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997). The Circuits

the provision of focused information to the court of appeals and the modest raising of the appellate bar for non-intervening objectors will enhance appellate efficiency, and they are fully appropriate in the context of a representative action, in which the duly certified class representatives have already settled the case with judicial approval.

B. Petitioner's Objections to Use of the Intervention Procedure in This Context Are Insubstantial

Petitioner and his amici argue that use of the intervention standard in this context is unfair or unworkable, but their objections do not withstand examination. Most importantly, there is little weight to the complaint that an intervenor will be subject to extensive procedural requirements, or unfairly required to shoulder litigation burdens such as discovery. *See, e.g.*, Pet. Br. 39. There is no reason to suppose that the forms of pleading required for an intervention motion will be unduly difficult to produce for one who intends, after all, to impose the burdens of an appeal on all the existing parties.[9] As to discovery, if a class member is permitted to intervene at the time of a settlement hearing, there may well be little or no reason to take discovery. If intervention comes earlier, full discovery may be appropriate. At any stage, if the class member is seeking to become so much a "party" to the proceedings that he will be entitled to appeal from the judgment,

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have adopted varied standards of review for appeals from the denial of a motion to intervene as of right under Rule 24(a). *See, e.g., In re Holocaust Victim*, 225 F.3d at 197 (abuse of discretion standard appropriate); *Donnelly*, 159 F.3d at 409 ("We review a district court's denial of a motion for intervention as of right de novo, except that we review questions of timeliness for abuse of discretion."); *Twelve John Does*, 117 F.3d at 575 (abuse of discretion standard appropriate "to the extent that it turns on the adequacy of representation by existing parties").

[9] Of course, if the intervenor is seeking to "present [new or materially varied] claims or defenses," Fed. R. Civ. P. 23(d)(2), then there is every reason to require a complaint in intervention that specifically "set[s] forth the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c).

then in most cases surely there will be no just objection to requiring him to comply with the normal litigation burdens undertaken by any named party to the case — including providing other parties with any discovery that may be appropriate under the federal rules. Where relief from such burdens is appropriate, the district court can make orders suitable to the circumstances.

Petitioner's argument concerning litigation burdens, and his argument that class members often receive notice of a class action at the same time that they receive notice of a proposed settlement, do point up reasons why there is little need to fear another specter that he seeks to raise: that an intervention requirement will lead to large numbers of "prophylactic" interventions early in class cases, and inconveniently multiply the number of named parties in class litigation. *See* Pet. Br. 36-38. In deciding whether to intervene, just as in deciding whether to opt out of a class, a class member must always weigh the potential benefits and burdens of controlling her own litigating destiny, on the one hand, and trusting largely to the representative process, on the other. The balance is unlikely to change dramatically for most class members if this Court confirms that one cost of accepting representation is that the representatives will negotiate the details of any settlement, and unnamed class members will be able to raise objections only in the district court unless they file a timely motion to intervene. Certainly petitioner adduces no evidence that such consequences have followed in the circuits that already require intervention as a predicate for appeal.

C. Allowing Unfettered Individual Appeals by Objectors to Class Action Settlements Imposes Significant Costs

Any appeal from an otherwise concluded settlement imposes significant costs — on the class, on other parties to the case, and on the judicial system. It threatens to upset, at the behest of one litigant, compromise agreements that are often

heavily negotiated and carefully balanced among a variety of competing interests. At a minimum, it imposes considerable — and sometimes very lengthy — delay and substantial expense on the named parties, and through them on all members of the class.

Such costs are sometimes an inevitable part of the legal system, and they are no doubt worth bearing if an objecting class member can convince the district court that there is sufficient reason to question the adequacy of class representation, or the fairness (or legality) of the settlement, that the court should permit intervention for the purpose of raising those issues on appeal. The costs are also worth bearing if the class member can convince the court of appeals that the issues he or she seeks to raise are so substantial that the district court abused its discretion in denying a motion to intervene (at whatever stage of the proceedings).

There is, however, no sufficient justification for allowing any objector to impose such costs unilaterally. Under that legal standard for allowing objector appeals (which is to say, no standard), the risks of collusion or miscarriage of process in the district court settlement process, on which petitioner lays so much stress, are easily offset by the risk of "strategic" behavior by non-named class members and their counsel.

Once a settlement has been negotiated with the representative plaintiffs, notice will be given to class members under Rule 23(e). That notice alone may cost several million dollars in a large case. Once it has been given, objectors may materialize to raise legitimate concerns about the substance of the settlement and its fairness to the class — or, unfortunately, to attempt to take personal advantage of the fact that any material change in the settlement will require considerable additional delay and expense. It is easy to see that there can be great pressure on the named parties (both plaintiffs and defendants) to pay substantial amounts of "ransom" to such objectors in order to avoid even greater costs of delay or reworking of the settlement. *Cf. Duhaime v. John Hancock Mutual Life Ins. Co.*, 183 F.3d 1, 6 (1st Cir. 1999) (recogniz-

ing that side payments to objectors — particularly after an objector files an appeal — "raise[] the specter of extortive legal proceedings pressed 'not to redress real wrongs, but to realize upon their nuisance value.'") (quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548 (1949)).

These problems exist to some extent, of course, at the district court level, and the primary systemic line of defense against them is active supervision of the objection process by the district court. If district judges are careful in sorting out meritorious from non-meritorious objections, the opportunities for "strategic" behavior by objectors are sharply reduced. The district judge's ability to perform this critical role will, however, be severely compromised if objectors are allowed an unchecked right to appeal from the judgment approving the settlement without being subject to the discipline of district court procedure. Under those circumstances, a "strategic objector" need do no more (and perhaps less) than file an undeveloped statement of objections with the district court in order to stake out her position, prior to submitting an appellate brief (if necessary) months later.

The very real risk — indeed, the reality — of this sort of gaming of the appellate system is a primary reason why it makes sense to require intervention as a gatekeeping mechanism to determine in the first instance whether a settlement objector should be allowed to appeal. The district court is familiar with the named parties, the course of litigation, and the proposed settlement. It has the opportunity to see and evaluate the seriousness and good faith of objectors. It also has the opportunity to make adjustments that may satisfy some potentially meritorious objections without requiring significant delay or additional expense. The system should therefore require that objectors make their best case to the district court first, as an intervention requirement tends to ensure.

III. ARGUMENTS FOR THE EXPANSION OF APPEAL RIGHTS FROM NAMED TO NON-NAMED CLASS MEMBERS SHOULD BE MADE AND ADDRESSED THROUGH THE PROCESS FOR AMENDING THE FEDERAL RULES

For the reasons we have explained, requiring intervention as a predicate for independent appeal of an otherwise final settlement, when undertaken by a class member who has not been certified as a representative, is the solution most consonant with the present text, structure, and theory of Rule 23. There are, of course, arguments for change in the class-action process. In this as in other instances, however, the better approach for courts deciding current cases, including this Court, is to hew close to the lines drawn by the existing rules.

Recent draft amendments to Rule 23 highlight the fact that any change to the intervention requirement can and should be considered through the existing process for amending the Federal Rules. In August 2001, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States sought public comment on an extensive set of tentative proposed amendments to Rule 23, currently under consideration by the Conference's Advisory Committee on the Federal Rules of Civil Procedure. Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Rules of Evidence* (Aug. 2001) ("Proposed Rules"). The published proposals, which "grow[] out of ten years of Advisory Committee work" and reflect "the light of experience, empirical study, and academic and professional commentary," take "improving review of class-action settlements" as one "central focus." Proposed Rules at 22, 24 (memorandum of transmittal).

Notably, given that focus and the considerable discussion in the accompanying transmittal and commentary of the

issues and problems with class-action settlements, the proposed amendments deal entirely with settlement procedures and oversight *in the district court*. The only mention of settlement *appeals* occurs in the Committee's commentary to its proposed new Rule 23(e)(4), which would newly provide that any class member may object to a proposed settlement that requires approval by the district court — and (to regulate strategic behavior) that any objection, once lodged, could be withdrawn only with the approval of the court. *Id.* at 53 (§ 23(e)(4)).

That commentary notes that while "[a] class member may appear and object without seeking intervention[, m]any courts of appeals . . . have adopted a rule that recognizes standing to appeal only if the objector has won intervention in the district court," so that "[a]n objector who wishes to preserve the opportunity to appeal is well advised to seek intervention." *Id.* at 65. Furthermore, it notes specifically that, as we have argued, "[t]he important role that is played by some objectors must be balanced against the risk that objections are made for strategic purposes." *Id.* at 66. Observing that "[a]n objection may be ill-founded, yet exert a powerful strategic force," in part because "[b]oth initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members," the commentary urges courts to be "vigilant to avoid practices that may encourage unfounded objections." *Id.* at 66-67.

The structure of these tentative proposed amendments, and the commentary's accompanying observations, support the arguments that we have advanced in this brief. Perhaps even more important, however, they reflect the appropriate process for proposing, debating, and crafting changes to the rules that govern class-action litigation. Unless and until that process generates proposals for change in the appeal rights of unnamed class members, by far the better course for this Court is to adhere to the traditional mechanism of intervention, allowing district courts to fully and effectively dis-

charge their function as gatekeepers to the appellate process and principal managers of complex class actions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

SETH P. WAXMAN
Counsel of Record
EDWARD C. DUMONT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

CHRISTOPHER R. LIPSETT
MATTHEW P. PREVIN
ARLO DEVLIN-BROWN
WILMER, CUTLER & PICKERING
520 Madison Avenue
New York, N.Y. 10022
(212) 230-8800

Counsel for Amicus Curiae Citibank (South Dakota), N.A.

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